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NOTE AND COMMENT

THE DOMICILE OF A WIFE.—In 1908 Professor Dicey stated flatly, as a rule of the English law without exceptions, that the domicile of a married woman during coverture is the same as that of her husband, and changes with his.[1] It is a rule which makes for hard cases and offers constant invitations for exceptions to meet the situations it creates. Must a deserted wife follow her husband to the ends of the earth to secure the domiciliary jurisdiction for divorce? May he, by shifting his own place of permanent residence, arbitrarily deprive her of capacity to make a will, or determine the law to govern the devolution of the property upon her dying intestate? Where can she vote?

Despite the hardships, the rule has been consistently followed in England,[2] though with some departures in colonial decisions.[3] In a tight place,

[1] DICEY, CONFLICT OF LAWS [2nd ed.], 124, 132, 134.

[2] The cases of Deck v. Deck, 2 Sw. & Tr. 90, and Santo Teodoro v. Santo Teodoro, L. R. 5, P. Div. 79, allowed a wife to maintain a divorce suit in England when the domicile of the husband was elsewhere. But in the later decision of Le Mesurier v. Le Mesurier, [1895] A. C. 517, the doctrine that domicile is essential as a foundation for divorce jurisdiction was conclusively settled.

[3] Ho-a-mie v. Ho-a-mie, 6 Vict. Rep. (2 P. & M.) 113; overruled by Forster v.

the court has preferred to encroach upon the requirement that domicile is the basis of divorce jurisdiction, rather than admit the possibility of a married woman's separate domicile.[4] So it is not so surprising to find a strong reiteration of the principle of inseparability of the domiciles of husband and wife in a recent House of Lords case.[5]

A Scotchman married a Scotchwoman, and for a time resided with her in Aberdeen. He contracted dissipated habits, and with the wife's consent it was arranged that he should go to Australia. He established a domicile in Queensland, and contracted a bigamous marriage there. When the wife heard of this she instituted divorce proceedings in Scotland, where she had remained, but died before their termination. Upon the question of legacy and succession duty, it was held that the duty was not payable in the United Kingdom, as the deceased died domiciled in Queensland.

The decision called for by the facts is but a reaffirmation of the refusal to make exception to the unity of the domicile of husband and wife. It still leaves it an open question whether a judicial separation, or divorce *à mensa et thoro,* empowers the wife to establish a domicile of her own. It simply follows previous authority in insisting that the mere fact of conduct on the part of the husband which would relieve her of the duty to live with him, or furnish her grounds for divorce or separation, does not alone make it possible to establish such separate domicile.[6]

The court seems anxious, so far as it can, to shut off possibility of exceptions to its general rule. Previous cases had suggested that there might be situations where the wife's domicile would not follow that of the husband, as, for instance, where he deserted her.[7] These suggestions receive rough

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Forster, [1907], Vict. L. Rep. 159; Martin v. Martin, 17 N. Z. L. R. 126 (wife permitted to sue for divorce at last common domicile, though husband had gone elsewhere); Poingdestre v. Poingdestre, 28 N. Z. L. R. 604 (statute provided that when husband deserted the wife "shall be deemed * * * to have retained her New Zealand domicile"); Protapsaltis v. Protapsaltis, [1918], Queensland St. Rep. 270 (wife permitted to sue for divorce in the domicile where she was deserted by husband.

[4] As witness a case like Stathatos v. Stathatos, [1913], P. 46. An English girl married a Greek domiciled in England. Later he returned to Greece; the marriage was annulled because there was no Greek priest present at the ceremony, and the Greek remarried. The wife sued for divorce in England and got it, despite the court's reluctance in "giving the go-by to * * * the rule * * * that the wife's domicile is the husband's domicile." In de Montaigu v. de Montaigu, [1913], P. 154, a case presenting the identical problem, the court says that an exception is being made to the ordinary rule that domicile governs, because of the hardship involved. The hardship comes because the English court in Ogden v. Ogden, [1908], P. 46, refused to recognize the effect of a French decree of nullity of a marriage based upon the same jurisdictional facts considered sufficient in England for its courts. See "Jurisdiction to Annul a Marriage," 32 HARV. L. REV. 806, 818. So the plaintiff, like Kipling's *Towlinson,* belongs in neither place. Greece says she is not and never was married to her erstwhile husband, and has no place there; England says she is married to a Greek and domiciled in Greece.

[5] Lord Advocate v. Joffrey, 89 L. J. Rep. (P. C.) 209.

[6] Dolphin v. Robins, 7 H. L. C. 390; Yelverton v. Yelverton, 1 Sw. Tr. 574; In re Mackenzie, [1911], 1 Ch. 578.

[7] See Lord Cranworth, in Dolphin v. Robins, 7 H. L. C. 390, 419; Sir R. T. Phillimore, in Le Sueur v. Le Sueur, L. R. 1, P. D. 139, where the court assumes "that

treatment,[8] and the court concludes that the "only safe course is to keep close to the well-established rule that the domicile of a husband and wife, undivorced and unseparated, is one and the same." The House of Lords stands pat.

That the married woman always had her husband's domicile, and could have no other, was a necessary conclusion from the position the common law took with regard to the wife; her "very being or legal existence * * * is suspended during the marriage, or at least incorporated and consolidated into that of the husband."[9] It would be pedantry to demonstrate that this brutal fiction has vanished.[10]

It is said, however, that, despite the fact that the wife's person is no longer identified with that of her husband, the family is still the unit upon which our civilization is built; that the family must be organized—located—and some one must determine where its headquarters are to be. Since the husband usually bears the responsibility for the family support, he should determine the location of the family home.[11]

Members of a family ordinarily do have a common home, and it is situated where its head, the husband and father, establishes it. A fictitious unity of person is unnecessary to give legal effect to this fact. The wife, upon marriage, takes, by law, the husband's domicile.[12] She need go to the place to acquire it.[13] And, normally, when the husband changes his domicile that of the wife will change, too.[14] Does it necessarily follow that the law shall say that she cannot acquire a separate domicile when she does in fact couple physical presence with an intent to make a permanent abode at a place other than the domicile of the husband?

American courts have already gone a long way in recognizing the possibility of a separate domicile for the wife. If the husband deserts her, he cannot move her domicile with his, to deprive her of the privilege to sue

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desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicile for herself"; In re Mackenzie, [1911], 1 Ch. 578.

[8] Viscount Haldane thinks that there is no authority for holding that a married pair may have separate domiciles, and that the consequences would be extraordinary. Viscount Finlay believes the statement in the Le Sueur case is wrong. Lord Dunedin regards Lord Cranworth's remarks (*supra*) as self-contradictory.

[9] 1 BLACKSTONE, 442. And this was the reason assigned by the decisions. Williamson v. Osenton, 232 U. S. 619; Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Harteau v. Harteau, 14 Pick. 181; Dutcher v. Dutcher, 39 Wis. 651.

[10] Though Viscount Cave, in Lord Advocate v. Jeffrey, says that it appears to him that the rule as to the wife's domicile following that of the husband's "is a consequence of the union between husband and wife brought about by the marriage tie."

[11] This is admirably set out by Professor Beale in an article in 2 So. L. QUART. 93.

[12] Kennedy v. Kennedy, 87 Ill. 250; Parrett v. Palmer, 8 Ind. App. 356, 35 N. E. 713; Mason v. Homer, 105 Mass. 116; Hackettstown Bank v. Mitchell, 28 N. J. L. 516; In re Hartman's Est., 70 N. J. Eq. 664, 62 Atl. 560. Contra: Thompson v. Love, 42 Ohio St. 61, 80.

[13] Kashaw v. Kashaw, 3 Cal. 312; Christies Succession, 20 La. Ann. 383; Stevens v. Allen, 139 La. 658, 71 So. 936; Smith v. Smith, 19 Neb. 706, 28 N. W. 296; Yelverton v. Yelverton, 1 Sw. Tr. 574.

[14] Loker v. Gerald, 157 Mass. 42, 31 N. E. 709.

for divorce at their last common domicile.[15] Most courts go further, and say she may establish a separate domicile of her own to sue for divorce.[16] And the modern tendency seems to say that she may have this domicile, not for purposes of a divorce alone, but for any purpose.[17] And finally, some decisions say she may have a separate domicile when living apart from her husband without wrong on her part.[18]

Having gone this far, is there good reason for inquiry into the question of the rightfulness of the woman's conduct in setting up her separate abode? Acquisition of domicile is, generally, a legal consequence of presence in a place plus the requisite intent. Two reasons might be urged why the ordinary legal consequence should not follow when the domicile in question is that of a married woman. The first is her legal incapacity because of coverture. That is hardly permissible argument nowadays, when a married woman may vote, serve on juries, hold, manage, and transfer property, sue and be sued, as freely as her husband. The other is that the policy of preserving family unity demands that legal recognition be denied the actual fact of separate residence.[19] There are several answers to this point. It is not incompatible with the existence of the family ties that there be continuous cohabitation.[20] It also remains to be shown that denying legal effect to a separate residence by the wife will have any effect in deterring her from establishing one. No injustice is done the husband by recognizing the wife's separate domicile. If she has wrongfully left him he is not liable for support.[21]

Recognition of that legal relation between a person and a place which is called domicile does not in general depend upon the purity of a party's conduct. He may secure one where not authorized;[22] motives are immate-

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[15] Harteau v. Harteau, 14 Pick. 181; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740, leaving it an open question whether the wife could acquire a new domicile.

[16] Hanberry v. Hanberry, 29 Ala. 719; Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Stevens v. Allen, 139 La. 658, 71 So. 936; Sworoski v. Sworoski, 75 N. H. 1, 70 Atl. 119; Colvin v. Reed, 55 Pa. St. 375; Ditson v. Ditson, 4 R. I. 87; Craven v. Craven, 27 Wis. 418.

[17] Williamson v. Osenton, 232 U. S. 619; Watertown v. Greaves, 112 Fed. 183; Gordon v. Yost, 140 Fed. 79; Fitch v. Huff, 218 Fed. 17; Shute v. Sargent, 67 N. H. 305, 36 Atl. 282; White v. Glover, 116 N. Y. S. 1059. Contra: Estate of Wickes, 128 Cal. 270, 60 Pac. 867. Professor Beale disapproves of these enlargements of the doctrine. See the discussion, 2 So. L. QUART. 93.

[18] Cheever v. Wilson, 9 Wall. 108, *semble;* McKnight v. Dudley, 148 Fed. 204 (husband becomes insane, wife may choose domicile); Shute v. Sargent, 67 N. H. 305, 36 Atl. 282, *semble;* In re Geiser's Will, 82 N. J. Eq. 311, 87 Atl. 628, *semble;* Licht v. Licht, 150 N. Y. S. 643 (separation by agreement); Saperstone v. Saperstone, 131 N. Y. S. 241 (wife in New York permanently, husband refused admittance to the United States); In re Crosby's Estate, 148 N. Y. S. 1045 (long separation, cause not shown); Rundle v. Van Inwegen, 9 N. Y. Civ. Proc. R. 328; In re Florance, 7 N. Y. S. 578 (long separation); Buchholz v. Buchholz, 63 Wash. 213, 115 Pac. 88 (wife may have separate domicile "where there has been a mutual abandonment of the marriage relation").

[19] See article by Professor Beale (note 7), and discussion by Albert Hewitt, 91 CENT. L. JOUR. 4, 14.

[20] See 28 HARV. L. REV. 196.

[21] Ogle v. Dershem, 86 N. Y. S. 1101.

[22] Harral v. Harral, 39 N. J. Eq. 279.

rial.[23] No one ever questioned the power of a husband to acquire a new domicile, even when deserting his family. Such acquisition does not confer privileges only; it also brings burdens as well. The question should be settled without regard to the sex or marital condition of the actor.[24]

Iowa City, Iowa. H. F. G.

ADVERSARY PARTIES—SAME PERSON AS BOTH PLAINTIFF AND DEFENDANT. —Under the regulations promulgated by the Railroad Administration in 1918, all actions for injury to persons or property growing out of the possession or control of any railroad or system of transportation by the Director General of Railroads were required to be brought against the Director General. ORDER No. 50. Some courts refused to follow this order on the ground that it was contrary to the statute creating federal control. *Lavalle* v. *Northern Pacific Railway Company,* (1919), 143 Minn. 74; *Franke* v. *Chicago & N. W. Ry. Co.,* (1919), 170 Wis. 71.

But Order No. 50 has been generally observed, and actions arising under federal control have usually been brought against the Director General. He was declared to be the agent of the United States through which it exercised "no divided but a complete possession and control" of all railroads for all purposes. *Northern Pac. Ry. Co.* v. *North Dakota,* (1918), 250 U. S. 135, 148.

Under this situation a float belonging to the Central Railroad of New Jersey was rammed by a steam tug owned by the New York Central Railroad, and the Globe and Rutgers Fire Insurance Company, as insurer of the float, paid the loss and brought suit against the wrongdoer under its right of subrogation. According to Order No. 50, the wrongdoer was the Director General of Railroads, who was operating the New York Central Railroad and its steam tug. But since the insurer, as subrogee, stood in the shoes of the insured, and the insured, under federal control, was the Director General of Railroads, the action presented in controversy between the Director General of Railroads as operator of the Central Railroad of New Jersey and the Director General of Railroads as operator of the New York Central Railroad. But no one can sue himself, even in another capacity, so that the United States Circuit Court of Appeals for the Second Circuit held that the insured was absolutely without a remedy. *Globe and Rutgers Fire Insurance Co.* v. *Hines,* (1921), 273 Fed. Rep. 774.

The court here invokes a rule which has often been quoted in both legal

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[23] Williamson v. Osenton, 232 U. S. 619; Young v. Pollak, 85 Ala. 439, 5 So. 279; McConnell v. Kelley, 138 Mass. 372.

[24] It is not claimed, of course, that the power of a wife to establish a separate domicile at all times is authoritatively established. See Suter v. Suter, 72 Miss. 345, 16 So. 673; Hood v. Hood, 11 Allen 196. The point is not even arguable until the wife becomes emancipated from the shackles placed on her by the common law. But there is a decision or two where, consciously or unconsciously, the court did go to the full extent of the position here suggested, and numerous dicta having the same tendency. See Smith v. Smith, 4 Mackey (D. C.) 255; Thompson v. Love, 42 Oh. St. 61, 80; Colvin v. Reed, 55 Pa. St. 375; Prater v. Prater, 87 Tenn. 78, 9 S. W. 361; Dutcher v. Dutcher, 39 Wis. 651, 659; Buchholz v. Buchholz, 63 Wash. 213, 115 Pac. 88.